No. 14,926

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC FREIGHT LINES and SIDNEY S. RUSSELL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S OPENING BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant United States Attorney
Chief, Civil Division,

JOSEPH D. MULLENDER, JR.,
Assistant United States Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdictional Statement.

This suit was filed, and the District Court for the Southern District of California had jurisdiction thereof, under the Federal Tort Claims Act. (28 U. S. C. A. 1346(b).)

This Court has jurisdiction of the appeal from the District Court's Judgment under 28 U. S. C. A. 1291.

Statutes Involved.

The following portions of the Federal Tort Claims Act are applicable to the case:

"Section 1346. United States as defendant.

* * * * * * * *

"(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have

exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * * * *

"Section 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punative damages.

* * * * * * * *

"Section 2671. Definitions.

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

* * * * * * * *

"Employee of the government includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment, in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Statement of the Case.

This is a tort claims action by plaintiffs for personal injuries and property damage arising out of a collision between plaintiff's truck and a Government vehicle. Judgment was in favor of the plaintiffs against the Government driver and in favor of the Government on the ground that the Government driver was not acting within the scope of his employment at the time of the collision.

The sole issue is whether the trial Court erred in finding that the Government driver was not acting within the scope of his employment at the time of the collision.

The facts relative to the issue of scope of employment are as follows:

At all times material, the defendant Phelps was an Airman in the United States Air Force stationed at George Air Force Base, Victorville, California, and was employed as a driver in the Motor Pool. [R. 14 (Finding of Fact I.)].

On February 4, 1954, the day before the accident, at approximately 3:00 P. M., the Air Force dispatched a Government car to Phelps and ordered him to drive an Officer from George Air Force Base to Los Angeles, California, and to immediately return to George Air Force Base. [R. 14 (Finding of Fact II), R. 37, 38, 43, 67 and 68].

Los Angeles, California, is located at a point which is approximately 115 miles west of George Air Force Base. [R. 14 (Finding of Fact III), R. 32 and 33].

At approximately 6:00 P. M., Phelps arrived in Los Angeles, left the Officer at the Biltmore Hotel, and began making the return trip to George Air Force Base. [R. 15 (Finding of Fact V), R. 63 and 69].

On the return trip Phelps stopped for dinner at approximately 7:00 P. M., then continued on the return trip again, and arrived in San Bernardino, California, at approximately 9:00 P. M. At San Bernardino he remained in a tavern until approximately midnight, during which time he drank a couple of beers. [R. 15 (Findings of Fact VI and VII), R. 69, 79 and 81].

San Bernardino, California, is located at a point between Los Angeles, California, and George Air Force Base. It is approximately 75 miles east of Los Angeles and 40 miles west of George Air Force Base. [R. 32 and 33].

After leaving the tavern at approximately midnight, Phelps started driving in a general easterly direction toward the Air Force Base, picked up a hitchhiker, asked the hitchhiker to drive the car, and then went to sleep. [R. 15 and 16 (Findings of Fact VIII, IX, X and XI), R. 80].

When Phelps awoke, it was 5:00 o'clock in the morning, and he discovered that the hitchhiker had driven him to Barstow, California. [R. 16 (Finding of Fact XII), R. 80 and 81].

Barstow, California, is located at a point which is approximately 35 miles east of George Air Force Base. [R. 16 (Finding of Fact XIII), R. 32 and 33].

After waking up in Barstow at approximately 5:00 A. M., Phelps started driving in a general westerly direction toward the Air Force Base, and after he had driven approximately 10 miles he collided with the truck at approximately 5:15 A. M. [R. 16 and 17 (Findings of Fact XIV, XV, and XVII) R. 29, 33, and 81].

Summary of Argument.

There is substantial evidence to support the Finding that the Government driver was not acting within the scope of his employment at the time of the collision.

The Court did not err in failing to conclude as a matter of law that the Government driver was acting within the scope of his employment at the time of the collision.

The conduct of the hitchhiker is not chargeable to the Government.

ARGUMENT.

I.

There Is Substantial Evidence to Support the Finding That the Government Driver Was Not Acting Within the Scope of His Employment at the Time of the Collision.

The record in this case discloses that the Government driver's authority was limited to driving from George Air Force Base to Los Angeles by the shortest and quickest route and to return immediately. This was a matter that was so clearly understood that it did not bear repeating each time a car was dispatched from the Motor Pool.

The trip to Los Angeles was in fact made in three hours, including a stop to check the oil. On the return trip the driver departed from his scope of employment when he arrived in San Bernardino.

There, instead of continuing on to the Air Force Base, as he knew he was required to do, he spent the evening in a tavern. Upon leaving at midnight, approximately two hours after he should have been back at the Base, he picked up a hitchhiker, and ended up at Barstow at five in the morning. For some unexplained reason it required five hours to travel the distance of 75 miles on open roads after midnight.

Whatever the explanation is, the sum and substance of the situation is very clear. Phelps had planned to go into San Bernardino that night after work for an evening's entertainment. Since it was already 9:00 o'clock when he reached San Bernardino, he decided to stay rather than go back to the Base and then come back into town. He had ample time to return the car before the accident occurred. The situation is therefore no different than if he had gone

back to the Base and then taken the car again without any authority whatsoever.

As pointed out on page 10 of Appellants' Brief, Section 228 of the Restatement of Agency enunciates the factors the Court should look to in determining scope of employment, which is a question of fact. They are three in number, namely, is the conduct of the kind the person is employed to perform, is it substantially within the time and space limits of his authority, and is it actuated, at least in part, by a purpose to serve the master?

Taking first the time and space limits of the authority, we have here a case wherein the conduct was so far removed in both time and space that this factor in and of itself would seem to compel the conclusion that the driver was not acting within the scope of his employment at the time of the collision. As to time, Phelps was employed to make a seven hour trip, including a stop for dinner. The collision ocurred seven hours after he should have returned. As to space limits, he was to go straight to Los Angeles and return. The accident happened 25 miles beyond the Air Force Base.

With respect to the kind of conduct involved, the only similarity is that Phelps was authorized to drive the car and was in fact driving it when it ran into the truck. If that were enough, every person employed to drive a car would always be within the scope of his employment when he is driving a car. Obviously the Court must look further than this, as indicated in Section 229 of the Restatement, which sets forth some of the factors used in determining the similarity of kind of conduct.

Based on these elements, the kind of conduct involved here is far different from that which was authorized. The driver was employed solely to go to Los Angeles and re-

turn. In fact he went to a tavern and then picked up a hitchhiker and went to Barstow. Is this a departure which is commonly taken by Air Force personnel, does the Air Force have reason to expect such conduct, is this a normal method of going to Los Angeles and returning by the shortest and quickest route, is it not seriously criminal to misuse Government property?

Finally with regard to the purpose of the conduct, there is, of course, some similarity in that the driver was required to return the car to the Base, and was attempting to do so when the accident happened. When viewed in light of the disparity of time, space and kind of conduct, however, it would seem that this similarity of purpose has little if any bearing on the question.

II.

The Court Did Not Err in Failing to Conclude as a Matter of Law That the Government Driver Was Acting Within the Scope of His Employment at the Time of the Collision.

As already indicated, the question of scope of employment is one of fact in the first instance. This is, of course, an ultimate fact based on many other factors such as the kind of conduct, the time and space limits, and the similarity of purpose. Once these factors are established, the question of scope of employment may be decided as a matter of law, if reasonable men could not differ as to the ultimate conclusion.

In this case it is submitted that if any conclusion can be reached as a matter of law, it is that the Government driver was not acting within the scope of his employment when the collision occurred.

As pointed out by the trial Court, a California case closely in point is *Gordoy v. Flaherty,* 9 Cal. 2d 716, 72 P. 2d 538 (1937). There the employee had gone three blocks out of his way and was held to be outside the scope of his employment.

Another case, decided on the basis of California law, and quite similar on its facts, is *Long v. United States,* 78 Fed. Supp. 35 (D. C. Cal. 1948). There the Government driver was ordered to drive an Officer from March Field, California, to El Monte, California, and return. He delivered the Officer at El Monte, went out of his way to Los Angeles on his return trip, and was returning to the Base from Los Angeles when he had the accident.

III.

The Conduct of the Hitchhiker Is Not Chargeable to the Government.

As we have already pointed out, the Government driver had departed from his employment when he reached San Bernardino, and should have returned to the Base before he started driving again. He was therefore outside the scope of employment when he later picked up the hitchhiker.

If by any stretch of the imagination he can be said to have returned to his employment at that time, he clearly departed again when he picked up the hitchhiker. This was an act which was not only unauthorized, but one which could not reasonably be expected.

If he had entrusted the driving of the car to some one else who had an accident on the way to Los Angeles, or on the return from Los Angeles to San Bernardino, it might be that the Government would be responsible on the ground that although there would be an unauthorized

delegation it was a delegation of otherwise authorized conduct. The case of *Gates v. Daley,* 54 Cal. App. 654, 202 Pac. 467 (1921), relied on by Appellants, says nothing more.

If the hitchhiker did anything which is material to the case at all, it is that he either took Phelps outside the scope of his employment or furthered his departure which had begun several hours before. Clearly the Government cannot be held responsible for the very thing which constitutes a defense to liability under the Tort Claims Act.

Conclusion.

There is substantial evidence to support the Finding that the Government driver was not acting within the scope of his employment at the time of the collision, and the Judgment of the trial court should therefore be affirmed.

Dated, Los Angeles, California, 1956.

Respectfully submitted,

LAUGHLIN E. WATERS
United States Attorney,

MAX F. DEUTZ
Assistant United States Attorney Chief, Civil Division,

JOSEPH D. MULLENDER, JR.
Assistant United States Attorney,
Attorneys for Appellee.